

Nos. 491 and 848

MAR 22 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1964

**CORLISS LAMONT, DOING BUSINESS AS BASIO
PAMPHLETS, APPELLANT**

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLEE IN NO. 491 AND APPELLANTS IN NO. 848

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OPINIONS BELOW

The opinions of the three-judge district court in No. 491 (L.R. 18-33) ¹ are reported at 229 F. Supp. 913.

¹ "L.R." refers to the record in No. 491. "F.R." refers to the record in No. 848.

The opinion of the three-judge district court in No. 848 (F.R. 215-223) is reported at 236 F. Supp. 405.

JURISDICTION

The judgment of the district court in No. 491 was entered on May 19, 1964 (L.R. 35-36), and a notice of appeal was filed on June 17, 1964 (L.R. 37-38). The judgment of the district court in No. 848 was entered on November 25, 1964 (F.R. 223-224), and a notice of appeal was filed on December 17, 1964 (F.R. 226-227). Probable jurisdiction in No. 491 was noted on December 7, 1964 (379 U.S. 926), and in No. 848 on February 1, 1965. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether 39 U.S.C. 4008, as presently administered by the Post Office Department and the Customs Bureau, violates the First, Fourth or Fifth Amendment of the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are Section 305 of the Postal Service and Public Employees Salary Act of 1962, 76 Stat. 840, 39 U.S.C. 4008, and Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631, 22 U.S.C. 611(j). The regulations involved are Customs Regulation 9.13, 19 C.F.R. 237 (January 1, 1964), and Post Office Department Regional Letter, RL No. 65-38. The statutes and regulations are set out in the Appendix, pp. 33-41, *infra*.

STATEMENT

1. *The statute.*—Both these cases were instituted to test the constitutionality of a statute enacted in 1962 to establish certain postal procedures with regard to particular foreign mailings addressed to persons within the United States. The statute (pp. 33-34, *infra*), 39 U.S.C. 4008, requires the Postmaster General to detain and to deliver “only upon the addressee’s request” any mail having all of five characteristics: (1) unsealed; (2) originated, printed or otherwise prepared in a foreign country; (3) determined by the Secretary of Treasury to be “communist political propaganda”; (4) not furnished pursuant to subscription; and (5) not otherwise known to be desired by the addressee. The statute defines “communist political propaganda” in subsection (b) as material issued by or on behalf of any country with respect to which tariff concessions have been suspended or withdrawn or from which foreign assistance is withheld and which meets the definition of “political propaganda” provided in Section 1(j) of the Foreign Agents Registration Act of 1938. Subsection (c) of the statute exempts from its provisions any mail addressed to agencies of the United States Government and educational institutions and mail sent pursuant to a reciprocal cultural international agreement under which the United States sends an equal amount of matter to the country on whose behalf the “communist political propaganda” is issued.

The statute is currently administered by the Post Office Department and the Customs Bureau of the

Treasury Department as follows: The Customs Bureau initially determines which foreign countries meet the conditions prescribed in subsection (b).² All unsealed mail from those countries is then routed by the Post Office Department through one of ten screening points established by the Customs Bureau.³ At the screening points, exempt mail is sorted out by postal personnel, and it is immediately dispatched. The remaining mail is examined by Customs authorities to determine whether it constitutes "communist political propaganda" within the meaning of 39 U.S.C. 4008. Whatever mail matter is held not to be such propaganda is then dispatched, and what remains is detained by the Post Office Department to abide in instructions from the addressee.

The Post Office sends a notice to the addressee (Form 2153-X) advising him that he has received unsealed mail matter which has been determined to be

² The countries from which mail matter arriving in the United States is routinely screened are Albania, Bulgaria, Cuba, Czechoslovakia, Danzig, East Prussia, Estonia, Hungary, Indochina, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Poland, Rumania, Southern Sakhalin, Tanna Tuva, Union of Soviet Socialist Republics, and Yugoslavia. Mail coming from parts of the following countries which are under Communist domination or control are also screened: Cambodia, China, Germany, Korea, Laos, and Vietnam. In addition, mail coming from Canada, Hong Kong, Japan and Mexico is made available to the Customs Bureau screening units. Hearings on *Exclusion of Communist Political Propaganda from the U.S. Mails* before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 8.

³ The current screening points are: Chicago, El Paso, Honolulu, Los Angeles, Miami, New Orleans, New York City, San Francisco, San Juan, and Seattle.

communist political propaganda; and that it cannot be delivered unless the addressee wants it. The notice (L.R. 13; F.R. 10) identifies the mail matter received and requests the addressee to indicate, by checking an appropriate box, whether he wishes to have the mail delivered. The notice states that if no response is received within twenty days, it will be assumed by the Post Office Department that the addressee does not want the identified publication or any similar publication which may subsequently arrive.

Before March 1, 1965, it was the policy of the Post Office Department to provide a space on the card for an indication of the addressee's desire to have all similar publications delivered in the future. This required the Post Office to keep a current file of persons who had indicated a desire to receive such publications. In a Regional Letter dated March 1, 1965 (RL No. 65-38, pp. 39-41, *infra*), the Postmaster General terminated this practice effective no later than March 15, 1965. We have been advised by the Post Office Department that notices sent after March 15 offer an addressee the choice of having the particular item delivered or not, and permit him to leave standing instructions as to future similar publications only if his wish is not to have them delivered.⁴ We have also been advised that the revised notices to be issued under this changed procedure will inform addressees (1) that the Post Office will keep no record other than a list or file of those who, by returning

⁴The Post Office Department intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently.

the notice or by silence, leave standing instructions not to have such mail delivered and (2) that the returned notice itself will be destroyed.

2. *District court proceedings.*—(a) No. 491—In July 1963, Dr. Corliss Lamont, who does business under the name "Basic Pamphlets" in New York, was notified by the Post Office Department under 39 U.S.C. 4008 that a copy of *Peking Review* #12 was being detained in San Francisco pending his instructions (L.R. 2, 10, 13). Dr. Lamont did not respond to the notice, but instead brought suit in the Southern District of New York to enjoin the enforcement of the statute and have it declared unconstitutional on the ground that it violated rights under the First and Fifth Amendments (L.R. 3, 10).

The Post Office Department thereupon notified Dr. Lamont that the institution of the suit was understood by the Department as "an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda" (L.R. 5). Accordingly, the Post Office advised, all mail being detained would be delivered immediately and no future mail addressed to Basic Pamphlets or to Dr. Lamont personally would be detained (L.R. 5-6). On the basis of this action by the Post Office Department, the government suggested that the case was moot (L.R. 14).

Dr. Lamont thereupon filed an amended complaint wherein he also alleged that the Post Office Department was keeping a list of those who had expressed a

desire to receive "Communist political propaganda" and sought to have his name removed from this list (L.R. 3-4). On Dr. Lamont's motion a three-judge court was convened (L.R. 7, 17-18). Cross-motions for summary judgment and for dismissal of the complaint were filed (L.R. 6, 17).

A majority of the three-judge court dismissed the complaint as moot (L.R. 19-30). It reasoned that as a result of the Post Office Department's treatment of Dr. Lamont's institution of suit as an expression of desire to receive such mail and the Postmaster General's order that Dr. Lamont's mail not be detained, there was no present controversy between the parties to the suit (L.R. 21-23). With respect to the claim that the Post Office's retention of a list presented a live controversy, a majority of the court held that the asserted danger of public disclosure was "largely speculative" and was "only an abstract possibility, not an immediate threat" (L.R. 25, 26). Hence it dismissed this aspect of the complaint as not ripe for adjudication (L.R. 27). Judge Feinberg dissented on the grounds that there was a sufficient question of fact regarding the likelihood of disclosure of the list to require denial of the motion to dismiss and that, in any event, Dr. Lamont was entitled to assert the rights of parties who would be afraid to bring suit (L.R. 31-33).

(b) No. 848—In July 1963, Leif Heilberg received Post Office Department Form 2153-X, which advised him that the Post Office was detaining one copy of a publication entitled "A Proposal Concerning The General Line of the International Communist Movement"

(F.R. 2-3, 10, 147-149). He thereupon instituted this action for a judgment declaring 39 U.S.C. 4008 unconstitutional and for an order enjoining the Postmaster in San Francisco, the Postmaster General, the Collector of Customs, the Secretary of the Treasury and their agents from enforcing the statute on the ground that the placing of his name on a list of persons willing to receive "Communist political propaganda" would stigmatize him and abridge rights guaranteed by the First Amendment (F.R. 3-4). He also alleged that the statute violated the Fifth Amendment in that it arbitrarily distinguished between persons like himself and educational and governmental institutions and because its standards for determining "communist political propaganda" were vague and uncertain (F.R. 7).

On September 16, 1963, the general counsel of the Post Office Department advised Heilberg by letter that the institution of his suit was considered by the Department to be an expression of desire to receive "Communist political propaganda" and that in the future no such mail addressed to him would be detained (F.R. 28-29, 31, 32). The government then filed a motion to dismiss the action on the ground of mootness (F.R. 35).

A three-judge court was empaneled, and after hearing arguments and testimony, it denied the motion to dismiss (F.R. 49-152). After interrogatories were submitted and answered by both sides (F.R. 158-161, 163-177, 178-180), the court held further hearings (F.R. 181-215) and then determined that the statute was unconstitutional on its face (F.R. 223). Re-

serving the question whether the delay in receipt of an addressee's mail under this statute alone infringes upon constitutional liberties (F.R. 219), the court held that the disclosure of identity required as a condition for receiving the mail amounted, in light of the Post Office's practice of keeping a list of willing addressees, to "an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory" (F.R. 221). The court held that this "invasion" was not justified by any compelling governmental interest and that there were alternative means for achieving the same result (F.R. 221-222). Consequently, it declared 39 U.S.C. 4008 unconstitutional under the First Amendment and enjoined its enforcement (F.R. 223-224).

ARGUMENT

Introduction and Summary

The present case, stripped of clichés and with broad abstractions reduced to concrete actualities, involves a very narrow question. Congress enacted Section 305 in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. Section 305, reduced to its simplest terms, represents a Congressional decision that the United States should not thus subsidize the delivery of the political propaganda of a foreign power when there is no reason to suppose that the addressee desires to receive it,

but that such mail should be made available, even at public expense, to those addressees who desire it. Accordingly, the statute calls for delivery of such mail whenever the Postmaster General has reason to believe that delivery is desired and, in other cases, directs him to ascertain and carry out the addressee's wishes. There is no censorship. There are no consequences except that delivery is suspended for a day or two while the addressee is put to the trifling task of marking a card if he wishes delivery.

We claim no support for this statute in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry. There is no such restriction. The attack upon the statute reduces to the assertion that the United States has a constitutional duty to subsidize the plaintiff's receipt of propaganda from foreign countries which refuse reciprocal dissemination even though the plaintiffs have too little interest in the propaganda to request its delivery, and delivery to them would require affronting the sensibilities of other addressees opposed to distribution. The First Amendment imposes no obligation upon the federal government to subsidize such indiscriminate delivery of the propaganda of foreign powers.

The statute does not violate the Fifth Amendment. The definition of "communist political propaganda" is an adequate guide for administrative action. This is not a criminal statute which requires anyone at peril of life, liberty or property to speculate about its meaning.

The suggestion that a hearing is required is frivolous. There is no way in which a hearing could be held without detaining the mail for a brief period. Under the statute the mail must be, and is delivered, to any addressee who so requests as promptly as he could be given notice of a hearing and long before a hearing could be completed. Nor is there anything arbitrary in allowing distribution to educational institutions, libraries, scientific organizations and their personnel. The very nature of their activities indicates that they probably do desire the material for their own use or that of the public.

There is no search or seizure in violation of the Fourth Amendment. The examination of this third class mail is no different from the inspection required to determine whether it qualifies for such carriage. Requiring an addressee to indicate his desire to receive the mail does not force him to incriminate himself because the expression of such a desire would have no probative value in any imaginable prosecution.

I

THE STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT

Although "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever" (*Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156), not every postal regulation can be automatically assimilated to a law abridging freedom of expression. For the relevant conditions and consequences of a postal regulation, as

well as its substance, may be quite unlike anything involved in the attempted regulation of speech or publication. The present case exemplifies important differences. When the clichés are stripped away and attention is focused upon the precise scope and consequences of Section 305, it becomes apparent that no large questions of freedom to speak or to hear, or of privacy or association, are presented.

One special circumstance involved in the carriage of the mails—often unimportant standing alone but sometimes material in conjunction with others—is the cost to the government. The taxpayers, through the government, are subsidizing the distribution of literature, propaganda and other writings whenever the Post Office carries mail at less than cost. That was one of the concerns of the sponsors of Section 305. *Postal Rate Revision of 1962*. Hearings before the Senate Committee on Post Office and Civil Service, 87th Cong., 2d Sess. (1962) (hereinafter *1962 Senate Hearings*), pp. 842-843, 918-919, 930.

Second, in this case the senders of the mail are not persons with rights under the First or Fifth Amendments. The mail comes from overseas. The senders are foreign governments or persons acting on their behalf. Section 305 applies only to matter prepared in a foreign country and "issued by or on behalf of" certain foreign powers. Thus, there is not likely to be any violation or abridgment of a constitutional right to speak. See *Johnson v. Eisentrager*, 339 U.S. 763; *Galvan v. Press*, 347 U.S. 522; Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 UCLA L. Rev. 805, 842, n. 161 (1964).

In addition, as we show below, even the foreign power is allowed to enjoy the benefits of the subsidy in addressing anyone who desires to receive its message.

Third, the freedom of expression guaranteed by the First Amendment undoubtedly includes opportunities to read and hear as well as to publish and speak,⁵ but the relationship of addressee to the sender of mail is altogether different from that between the publisher or speaker and his audience. Everyman's scrap basket attests the fact that the addressee of mail, if the government makes delivery, receives items that he does not want. The intrusion may seem trivial to some and important to others; but there is an intrusion upon the householder's attention quite unlike the effect of speeches upon a voluntary audience. Congress was aware, when Section 305 was adopted, that many recipients of the Communist propaganda from foreign powers at public expense were not only unwilling addressees but were sufficiently offended to complain to their representatives. See pp. 16-17, *infra*.

The amendment is addressed to these peculiarities of foreign mail. It deals with them in a manner which has minimal consequences for freedom of communication. The Post Office continues to carry the propaganda regardless of its source or content. It continues to make automatic delivery to anyone who, it has reason to believe, wishes to receive the propaganda. That is the case with respect to matter addressed to any government agency or public library

⁵ *Martin v. Struthers*, 319 U.S. 141, 143; cf. *Marsh v. Alabama*, 326 U.S. 501.

or "any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof" (Section 305(c)(1)). It is a fair inference, although not inescapable, that such institutions and individuals may be interested in gathering a wide variety of published matter for their own use or that of others interested in reading it. Similarly, although there have been some difficulties in administration, the statute specifically excepts "any matter which is furnished pursuant to subscription";* for in such cases also the Post Office may fairly infer that the addressee desires the publication. Section 305 also excepts any other matter "ascertained by the Postmaster General to be desired by the addressee."

The sole consequence, therefore, is to suspend delivery at public expense of Communist propaganda from foreign powers or their agents for so long as there is no reason to suppose that the addressee desires to receive it. In such cases the Post Office inquires whether the addressee wishes the mail; if he says that he does, it immediately makes delivery. The practice is to ask the addressee to indicate his wish upon a pre-addressed post card. At one time files

* In the case of newspapers and other well-known periodicals the Post Office may fairly infer that regular copies are sent pursuant to subscription. Moreover, so long as one request for delivery of the mail was treated as notice of a continuing desire to receive it, the subscriber obtained the Communist propaganda without further action. The abandonment of all lists and card files has posed a problem in determining what material is furnished pursuant to subscription where the publication is not readily identifiable. It is impossible to state at this time how the Post Office will hereafter handle this aspect of the administration of Section 305.

of post cards were maintained so that the Post Office might continue to deliver such mail without further indication of the addressee's wishes, but because of criticism that such "lists" could be used by government agencies to scrutinize individuals' interests or beliefs, the files were destroyed, and a new card must be marked in each instance, which is then destroyed after it has served its purpose. However, the statute seems to make it plain that any individual who wishes to have the propaganda delivered without further inquiry may put the Postmaster General upon notice simply by a continuing request in a letter.

The net effect is small indeed. No one who wishes to receive any material is denied it. Such persons are put to the trifling nuisance of marking a post card addressed to the Post Office. There is a short delay in delivery, but it seems inconsequential when one recalls that the matter involved is foreign mail that has already traveled great distances by the slower forms of transportation.

It is true that there are probably some persons who because of inertia or carelessness fail to mark the post card requesting delivery and thus do not see materials which they would receive and might read if all the propaganda were automatically delivered. But the only senders denied this opportunity to intrude themselves upon that group of addresses are foreign powers and those acting on their behalf, and they are denied only the opportunity to have the United States subsidize the intrusion.

The question presented in the present case, therefore, comes down to whether so trivial and temporary an interference with the opportunity of persons in the United States to read the unsolicited propaganda of foreign powers at public expense is unconstitutional even though enacted by Congress to accomplish two legitimate objectives.

One purpose was to protect the sensibilities of the addressees of Communist propaganda who were affronted and often harassed by such mail, especially United States citizens of recent foreign origin. An investigation of the distribution of Communist propaganda through the mails was conducted by the House Un-American Activities Committee in 1956 and 1957. The committee was told early in its investigation that sometime during 1955 those in charge of a screening program which survived from World War II had learned that much of the unsolicited Communist propaganda being sent into the United States through the mails was directed to American citizens whose origins were in Soviet bloc countries. *Investigation of Communist Propaganda in the United States*, Hearing before the House Committee on Un-American Activities, 84th Cong., 2d Sess. (1956) (hereinafter *1956 House Hearings*), p. 4695. This sort of propaganda took the form of an appeal to these addressees to return to their homeland. See exhibits at *1956 House Hearings* 4707-4714. The Deputy Collector of Customs in charge of the program advised the committee that he had received many complaints from persons to whom this material had been addressed (*1956 House Hearings* 4696; see also *id.* at 5427):

Many such complaints have been sent to Members of the House and Senate. The tenor of these complaints are that the recipients do not wish to have this material and in some cases the addressees are frankly scared since their whereabouts in this country have become known. These people unfortunately do not know that this is part of a general program and that thousands of similar letters have been sent, the names often obtained from telephone directories and fraternal organization listings.

An illustrative letter sent by a group of five or six recipients of such mail was read to the committee. *1956 House Hearings 4717.*

To prevent unwanted mail from being inflicted upon unwilling addressees is not to censor their reading but to protect their privacy. The sponsor of the amendment made it plain that he had no reluctance to allow the widest circulation of Communist propaganda (*1962 Senate Hearings 930*):

Certainly we have little or nothing to fear from their propaganda; Americans are accustomed to learning all sides of all issues through our free press. But there is no reason why the American taxpayer should pay for the free or subsidized delivery of Communist propaganda by the Post Office.

In *Breard v. City of Alexandria*, 341 U.S. 622, this Court sustained a local regulation which struck in favor of privacy the balance "between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results" (341

U.S. at 644). Intrusion into a mailbox is effective entry into the home, and there can be hardly any doubt that there is a legitimate governmental interest in protecting persons against such unwanted invasions. Indeed, the district court in No. 848 recognized as much, although it mistakenly supposed that this interest could be satisfied by use of the postal regulation which entitles any person to authorize the postmaster to withhold delivery of particular classes of mail. 39 C.F.R. 44.1(a) (F.R. 222). In many cases the addressee will have no reason to suppose that such propaganda will be addressed to him. He is, of course, put on notice by the receipt of propaganda, but the burden of stopping further distribution is no less than the burden upon the willing addressee to arrange it.

In relying upon *Breard v. City of Alexandria* we do not forget that house-to-house canvassing is a familiar—perhaps indispensable—method of seeking converts to new causes. *Martin v. City of Struthers*, 319 U.S. 141. Whatever the extent of the right to knock on doors to summon householders and request their attention, it is irrelevant here for *Breard* and *Struthers* involve the right of the canvassers, whereas here the senders of the mail are foreign powers entitled to no such constitutional protection. The same circumstance, we submit, answers any suggestion that Section 305 discriminates against the dissemination of particular ideas and thus constitutes a form of censorship. Section 305 applies only to propaganda

⁷ This is the short answer to the argument that the statute is broader than necessary. See Brief for Appellant in No. 491, pp. 27-29.

transmitted by or on behalf of certain foreign governments which are refusing to open their mails to the free dissemination of publications from the United States. Since they are all Communist governments, it is safe to assume that they are not engaged in distributing other forms of political propaganda.

The second objective of the sponsors of Section 305 was to deny foreign powers which refused a reciprocal exchange the benefit of having the United States subsidize the delivery of their propaganda to persons who either (a) did not want it or (b) did not subscribe and had too little interest to mark a postcard indicating their desire for delivery. Representative Cunningham, the sponsor of Section 305, testified at the Senate hearings that his amendment was based upon a desire to make Communist political propaganda "pay its own way." *1962 Senate Hearings* 914. This was justified, he said, because Communist countries did not reciprocally permit American publications free access to their citizens (*1962 Senate Hearings* 919):

* * * The point is that they do not deliver our printed matter so it is truly and accurately a free delivery of mail by our Post Office Department because there is no reciprocity by the Communists.

We are spending our money to deliver their printed matter, but they are not spending their money to deliver ours.

In answer to a question from a member of the committee, the Congressman explained that Communist propaganda might be considered as "pay[ing] its way" if unrestricted distribution of it in the United States

would result in similar distribution of this country's literature in Communist countries (1962 *Senate Hearings* 927-928):

* * * The only way it can pay its way is if we get the same reciprocity from the Communist bloc nation. We can afford to spend a little of our money delivering their stuff if they will deliver ours, but they are not delivering ours. Therefore, we are not getting any benefit from delivering this stuff free.

His prepared statement made this point even more explicitly (1962 *Senate Hearings* 930):

In simple language, what the House of Representatives has said to the Communist-bloc nations is this:

"We demand a free exchange of ideas and information between our countries. You are not allowing our ideas and information to be circulated among your people; you are therefore violating the reciprocal terms of the Universal Postal Union. As a result we take this action and will stick to it until you permit the free exchange of information between our countries, including the right of inspection to see that all parties are living up to the agreement."

The subsidy was not trifling. In 1960 the number of pieces of Communist printed matter turned over to the Customs Bureau by the Post Office, excluding first class mail, was 21 million, 607 thousand pieces.

It is argued that the failure to make delivery unless requested interferes with the free receipt of knowledge because the necessity of making a request opens the doors to identification, publicity and reprisals. The interest in anonymity asserted here is

very different from the rights of an association to refuse to disclose its membership list for fear of reprisal which was recognized in such cases as *NAACP v. Alabama*, 357 U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516.⁸ Even if the abstract principle be the same, it has no practical application to the present case. There is not the slightest reason to anticipate governmental reprisal. The present procedure is calculated to reduce, if not eliminate, even the hypothetical possibility that to request delivery of Communist propaganda may lead to investigation. Although a card file was formerly maintained, Post Office procedure has been changed so that no list or file is maintained by that Department (pp. 39-41, *infra*). The addressee is informed that his returned postcard will be destroyed, so that he is disclosing his wish to read Communist political propaganda only momentarily to the postal official who receives and processes the returned notice. What small danger there is that he will become known in the community as a reader of Communist propaganda would seem less significant than the similar risk that might be inflicted, in the absence of Section 305, upon addressees to whom delivery was made even though they were in fact unwilling. Snooping and overzealous neighbors who are concerned about such mail are not likely to inquire how or why the foreign propaganda came to be delivered. We think—and sincerely hope—that both dangers are chimerical. One can hardly be greater than the other, however, and, if a choice must

⁸ See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539.

be made, surely the one to bear the risk is the willing, not the unwilling, recipient.

The claim that there is a constitutional right to receive all mail without delay deserves only brief mention. Whatever right exists to uninterrupted delivery of the mails is certainly subject to reasonable regulation by the Post Office. Certain classes of mail, for example, travel more slowly than others. Mail which cannot fit into a box or which is registered and for which a recipient must sign may not be delivered unless the addressee comes to the Post Office to call for it. The delay in delivery in each of these instances is justified by administrative necessity. In the present case, as well, if an inquiry is first to be made of an addressee to determine whether he comes within the class of those which the statute was intended to protect, there will necessarily be some delay in delivery.

There is no indication whatever in this record that the materials detained by the Post Office were of a kind as to which timely delivery is essential. They came from overseas by relatively slow methods of transportation. It is quite clear, moreover, that delay is not the gravamen of the plaintiffs' complaint. If, for example, the statute reversed the presumption and authorized the Post Office to send a notice informing an addressee that Communist political propaganda being detained at the Post Office would be delivered to him in five days unless he returned the card indicating that he did not want it, the delay would be the same.

There is not the faintest resemblance between Section 305 and the licensing laws invalidated in the cases cited by appellant in No. 491 (Brief, pp. 17-19). *E.g.*, *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. State*, 308 U.S. 147; *Thomas v. Collins*, 323 U.S. 516; *Niemotko v. Maryland*, 340 U.S. 268. The present statute does not empower government agents to decide what forms of expression will reach the public. The purpose of the pre-delivery examination in this case is not to decide, as a licensor or censor, whether its contents are fit for distribution. The sole function is to ascertain whether the government is being asked to subsidize the propaganda of a foreign power and a kind of material which the addressee may well be reluctant to receive. If the addressee wishes, the government affords the subsidy and makes prompt delivery. His right to know is unimpaired.

We do not suggest that any such large and important public interests are involved as would support a true invasion of freedom to speak or publication, or of freedom to hear, read and learn. No such interests are implicated on either side. In the final analysis the attack upon Section 305 necessarily asserts that the government owes the plaintiffs a constitutional duty to subsidize the indiscriminate receipt of propaganda from foreign powers (which refuse to disseminate American publications), even though the plaintiffs have too little interest in the propaganda to request its delivery and even though delivery to them would require affronting the sensibilities of other addressees unwilling to receive such distribution. Whatever the wisdom of the legislation or its political symbolism—

and important as they may be in other forums—the mere statement of the legal proposition is enough to reveal that the federal government has no such constitutional duty to subsidize such indiscriminate delivery of the mailings of foreign powers.

II

THE STATUTE DOES NOT VIOLATE THE FIFTH AMENDMENT

A. ALLEGED VAGUENESS IN THE DEFINITION OF "COMMUNIST POLITICAL PROPAGANDA" DOES NOT INVALIDATE THE STATUTE

In defining "Communist political propaganda" the statute incorporates the definition given to the word "political propaganda" in Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U.S.C. 611(j), and adds to it the requirement that such propaganda be "issued by or on behalf of" certain defined countries which are generally those in the Communist bloc. Relying on decisions of this Court which have invalidated criminal statutes whose provisions were vague⁹ or loyalty-oath requirements which were phrased in broad terms,¹⁰ appellant in No. 491 contends that this statute violates the Fifth Amendment because it is vaguely phrased. But unlike the criminal cases, this statute does not require a person "at peril of life, liberty or property to speculate" as to its meaning. *Lanzetta v. New Jersey*, 306 U.S. 451, 453. Nor, unlike the loyalty-oath cases, is any person required to perform any affirmative act (with possible

⁹ *Connally v. General Construction Co.*, 269 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451; *United States v. Cardiff*, 344 U.S. 174, 176.

¹⁰ *Cramp v. Board of Public Instruction*, 368 U.S. 278; *Baggett v. Bullitt*, 377 U.S. 360.

criminal perjury consequences) in reliance on his interpretation of the statute's meaning. Section 305 is merely a guide to Post Office officials in exercising the administrative judgment whether to deliver the mail directly or first ascertain whether delivery is desired. In *Lichter v. United States*, 334 U.S. 742, 786; this Court enumerated a whole series of general statutory phrases which it had sustained in earlier cases as permissible delegations of administrative authority:

“Just and reasonable” rates for sales of natural gas, *Federal Power Comm’n v. Hope Gas Co.*, 320 U.S. 591, 600–601; “public interest, convenience, or necessity” in establishing rules and regulations under the Federal Communications Act, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–226; prices yielding a “fair return” or the “fair value” of property, *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397–398; “unfair methods of competition” distinct from offenses defined under the common law, *Federal Trade Comm’n v. Keppel & Bro.*, 291 U.S. 304, 311–312, 314; “just and reasonable” rates for the services of commission men, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 431; and “fair and reasonable” rent for premises, with final determination in the courts, *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243, 248–250.

Even under the standards of the cases on which appellant relies, the definition is not unconstitutionally vague. The Foreign Agents Registration Act's definition of “political propaganda” has stood for more than 25 years without challenge. While it may,

as appellant argues, apply by its terms to marginal cases which were not within the legislative intention, that is not the test by which its constitutionality should be measured. *United States v. National Dairy Corp.*, 372 U.S. 29, 32. The words "political propaganda" are themselves readily comprehensible to persons of ordinary intelligence, and the added requirement that it be issued by or on behalf of certain Communist countries prevents wholesale application of the statute to publications beyond its intended scope.

B. THE FAILURE TO AFFORD AN ADMINISTRATIVE HEARING DOES NOT INVALIDATE THE STATUTE

Another Fifth Amendment challenge is based on the fact that the government officials in charge of administering Section 305 do not provide a full hearing before determining whether any particular piece of mail is Communist political propaganda (Brief, No. 491, pp. 34-36). To the extent that this claim is based on the existence of a Post Office "list" of willing addressees of Communist propaganda and this Court's decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, it is enough to say that the practice of keeping lists has now been abolished by the Postmaster General (pp. 39-41, *infra*).

As for the mail matter itself, no suggestion is made by plaintiffs as to why a hearing should be required. This is not a case, as were *A Quantity of Books v. Kansas*, 378 U.S. 205, and *Marcus v. Search Warrant*, 367 U.S. 717, in which publications are seized or suppressed. The only determination made by the Customs Bureau agents is whether the material should

be delivered directly or be held for the request of the addressee. The addressee would seem to be the person entitled to notice of any hearing. Once he was given notice there would be nothing to hear; he may have the mail for the asking. The entire notion of an adversary hearing is meaningless in this context.

C. THE CLASS OF EXEMPT RECIPIENTS IS NOT ARBITRARILY SELECTED

The final Fifth Amendment challenge is that the exemptions provided in subsection (c)(1) are arbitrary and that the entire statute must, consequently, fall. The argument proceeds, however, on a basic misapprehension as to the purpose of the exemption. Appellant in No. 491 assumes that the exemption for government agencies, public libraries, or educational institutions is based on the premise that the material covered by the statute "is too hot for the average American to handle" (Br., p. 38).

In fact, however, as the plain meaning of the statute and its legislative history establish, it is intended to reach "Communist political propaganda" addressed to persons whose wishes regarding receipt of such material is unknown. The statute expressly provides for delivery of such mail to the addressee on his request or if his desire to receive it "is otherwise ascertained by the Postmaster General." In other words, Congress was as anxious to deliver such mail to those who wanted it as it was to spare those who did not.

During the hearings on the legislation, representatives of educational institutions, libraries, and scientific organizations testified in opposition to the Cun-

ningham amendment."¹¹ Their position was based largely on their own need to obtain the sort of information which would be contained in the publications to which the statute would apply. After this testimony, Representative Cunningham agreed to add the following provision to his bill (1962 *Senate Hearings* 923):

Provided, however, that any mail matter addressed to any United States Government agency, any college or university, or any public library shall be excluded from the provisions of this section.

This was obviously a recognition of the fact that this group of recipients would overwhelmingly want to receive such mail, and it would be a needless administrative burden to require notices to be sent to them. Congressman Udall subsequently summarized this thinking as follows:¹²

* * * I would think it is a rational assumption to make that the material is wanted if it is addressed to Hubert Jones, professor of Russian

¹¹ 1962 *Senate Hearings* 858-859, Letter and resolution from the American Association of University Professors; *id.* at 863-867, Testimony, an official of the National Science Foundation; *id.* at 870-873, Testimony, L. Quincy Mumford, Librarian of Congress; *id.* at 875-880, Statement, the American Council on Education; *id.* at 887-889, Statement, American Association of University Women; *id.* at 895-897, Statement, Association of Research Libraries; *id.* at 897-899, Statement, American Library Association; *id.* at 906-911, Statements and letters from other educational institutions.

¹² *Exclusion of Communist Political Propaganda from the U.S. Mails*, Hearings before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 88th Cong., 1st Sess. (1963), p. 64.

Studies, American University or to the Russian editor or the foreign editor of the New York Times.

III

THE STATUTE DOES NOT VIOLATE THE FOURTH AMENDMENT

A final challenge to 39 U.S.C. 4008 is based on the Fourth Amendment, presumably on the ground that the inspection of the mail matter received by any particular addressee constitutes an unreasonable search or seizure (Brief, No. 491, pp. 39-41). Plaintiffs do not explain, however, how the Post Office's examination of unsealed mail matter—which is expressly left unsealed for purposes of postal inspection (39 U.S.C. 251)—constitutes a search or seizure. Nothing at all is confiscated, and the only invasion of privacy is precisely that which the sender contemplated when he sent his mail unsealed rather than by first-class postage. See *Ex parte Jackson*, 96 U.S. 727.

Appellant in No. 491 agrees that third-class mail may be searched to find evidence, but apparently contends that it may not be read in order to determine its contents. But such mail must remain unsealed precisely for the purpose of permitting postal officials to inspect it and determine whether it qualifies as third-class mail. 39 U.S.C. 251, 235. The sort of examination involved in determining whether the mail is covered by 39 U.S.C. 4008 is no different from the inspection provided under 39 U.S.C. 251. In each instance the mail is not being read in order to decide whether it should be suppressed or in order to invade the addressee's privacy. The only purpose of both

inspections is to determine how the mail should be carried and delivered while in the custody of the Post Office.

The contention that an addressee is put to the choice of surrendering his mail or incriminating himself by coming forward to claim it (Brief, No. 491, pp. 40-41) is untenable. Evidence that an addressee of third-class mail expressed a desire to receive unsealed and unsolicited Communist political propaganda can, by no stretch of the imagination, be incriminatory because it has no conceivable probative value in a criminal prosecution. Even in a prosecution under the Smith Act such evidence would be inadmissible because the prejudice to defendant and deterrence to legitimate inquiries would outweigh any slight probative value it might have.

CONCLUSION

For the foregoing reasons, the judgment in No. 491 should be affirmed and the judgment in No. 848 should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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MARCH 1965.

APPENDIX

Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, October 11, 1962, 76 Stat. 840, 39 U.S.C. Section 4008:

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951

or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).

Section 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631 (22 U.S.C. 611(j)), reads:

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political sub-

division of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails;

TREASURY DEPARTMENT,

BUREAU OF CUSTOMS,

Washington, January 4, 1963.

To: Collectors of customs, appraisers of merchandise (Mail Division).

Subject: Restrictions and prohibitions: Importation of political propaganda in the mails.

Reference: Section 9.13, Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

1. PURPOSE

This circular is to call attention to Treasury Decision 55797, copy attached, promulgating regulations under Section 305, title III of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, approved October 11, 1962 (39 U.S.C. 4008), relating to Communist political propaganda arriving in the mails from abroad.

2. ACTION

The special customs units which will administer the law and regulations in question have been established at the ports of Chicago, Ill., El Paso, Tex., Los Angeles, Calif., Miami, Fla., New Orleans, La., New York, N.Y., San Francisco, Calif., Seattle, Wash., and Honolulu, Hawaii. All mail subject to examina-

tion under this law will be submitted to the special customs units by the Post Office Department.

3. EFFECTIVE DATE

The above-mentioned law and regulations are effective on January 7, 1963.

4. SUPERSEDED MATERIAL

Circular RES-15-PEN, dated April 7, 1961, is hereby superseded.

File: PEN 633.3 K.

PHILIP NICHOLS, Jr.
Commissioner of Customs.

(T.D. 55797)

MAIL MATTER, COMMUNIST POLITICAL PROPAGANDA— CUSTOMS REGULATIONS AMENDED

Section 9.13, Customs Regulations, relating to mail matter determined to be Communist political propaganda, added

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

To Collectors of Customs and Others Concerned:

TITLE 19—CUSTOMS DUTIES

CHAPTER I—BUREAU OF CUSTOMS

PART 9—IMPORTATIONS BY MAIL

Section 305, title III of the "Postal Service and Federal Employees Salary Act of 1962," Public Law 87-793, approved October 11, 1962, added a new section 4008 to title 39 (The Postal Service), United States Code, entitled "Communist political propaganda." The section becomes effective on January 7, 1963.

Subsection (a) of section 4008 requires determinations to be made as to whether certain mail matter is "Communist political propaganda" in accordance with the definition prescribed by subsection (b) of section 4008.

Part 9 of the Customs Regulations is hereby amended, as set forth below, to add a new section 9.13 to place in collectors of customs the authority to make the foregoing determinations. The new section also provides, among other things, that such determinations shall be communicated forthwith to the appropriate postmaster.

New section 9.13 shall become effective on January 7, 1963, and reads as follows:

9.13 Communist political propaganda

(a) Collectors of customs shall make determinations required by subsection (a) of 39 U.S.C. 4008* as to whether mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country is "Communist political propaganda" within the meaning of subsection (b) of 39 U.S.C. 4008.* Such determinations shall be communicated forthwith to the appropriate postmaster.

*(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable

(b) A collector of customs is authorized to make the foregoing determinations with respect to all mail matter whether it arrives in the customs collection district under his jurisdiction or in a customs collection district under the jurisdiction of any other collector of customs.

(c) Subsection (c) of 39 U.S.C. 4008* provides for the delivery of certain mail matter to specified classes of addresses without reference to whether such mail matter is "Communist political propaganda." The Post Office Department will determine which mail is in these categories (sec. 305, 74 Stat. 654; 39 U.S.C. 4008).

Part 9 is amended to add a footnote designated "9" reading as follows:

time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b) (39 U.S.C. 4008).

(R.S. 161, as amended, sec. 624, 46 Stat. 759; 5 U.S.C. 22, 19 U.S.C. 1624.)

PHILIP NICHOLS, Jr.,
Commissioner of Customs.

Approved: December 27, 1962.

JAMES P. HENDRICK,
Acting Assistant Secretary of the Treasury.

Mr. DULSKI. The committee will stand adjourned until tomorrow at 10 o'clock.

(Whereupon, at 11:53 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, June 20, 1963.)

RL No. 65-38

POST OFFICE DEPARTMENT

DEPUTY POSTMASTER GENERAL

[Regional Letter]

Date: 3/1/65

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. PURPOSE

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. ACTION OFFICES

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San

Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. BACKGROUND

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster it is appropriately filed for future reference solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. STATEMENT OF POLICY

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. IMPLEMENTATION OF NEW POLICY

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

JOHN A. GRONOUSKI,
Postmaster General.